

**IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION**

UNITED STATES OF AMERICA)	
)	
)	
V.)	
)	Case No.3:18CR000025-003
)	
THOMAS WALTER GILLEN,)	
Defendant.)	

MOTION FOR RELEASE PENDING APPEAL

COMES NOW, the defendant, Thomas Walter Gillen (hereinafter, ‘Mr. Gillen’ or ‘Gillen’ or ‘defendant Gillen’), by counsel, and respectfully requests that the Court grant Mr. Gillen bail pending his appeal of the constitutionality of the federal Anti-Riot Act set forth in 18 U.S.C. § 2101.

On October 10, 2018, Gillen and three other defendants were indicted and charged with conspiracy to commit an offense against the United States, to-wit, traveling in interstate commerce with the intent to riot, 18 U.S.C. § 2101, in violation of 18 U.S.C. § 371 (Count One), and a substantive violation of 18 U.S.C. § 2101 (Count Two).

On February 4, 2019 Mr. Gillen joined defendant Benjamin Daley in a motion to dismiss the indictment for the reason that the statute under which he was being prosecuted, the federal Anti-Riot Act, 18 U.S.C. § 2101, is

unconstitutional. On April 22, 2019 the Court held a hearing on the motion and heard arguments of counsel. On April 26, 2019, the Court issued an Order denying the motion. On April 29, 2019, Gillen entered a guilty plea pursuant to a plea agreement to Count One of the Indictment, and reserved the right to appeal the decision of the district court as to the constitutionality of 18 U.S.C. § 2101. On May 2, 2019, the Court issued a memorandum opinion setting forth its reasons for denying the motion.

Gillen is scheduled for sentencing on July 19, 2019. Gillen intends to file a notice of appeal immediately after being sentenced.

Factual Background

As detailed in the Sentencing Memorandum filed herein as well as set forth in the PSR, Gillen is a life-long resident of the State of California, Los Angeles area. Gillen was gainfully employed at the time of his arrest and has every expectation that upon release he will return to the same employment with the same employer, namely, New Generation Engineering and Construction in Gardena, California. Gillen's father, also of Los Angeles, California, will be present at the sentencing hearing on July 19, 2019. Gillen's mother is also a resident of Los Angeles, California. Gillen has numerous other relatives in the Los Angeles area and is assured a fixed and stable residence, in addition to full-time employment. Suffice it to say, Gillen did not attend any rallies after August 12, 2019.

Statutory Requirements

Pursuant to the requirements of 18 U.S.C. 3143 the defendant maintains that under these circumstances he is not a flight risk and does not pose a danger to the safety of any person or the community if released pending an appellate decision. The anticipated appeal will be narrowly focused on the constitutionality of the statute under which Gillen stands convicted. The appeal is not for the purposes of delay and raises a substantial question of law that if successful will result in a reversal of the conviction. Importantly, Gillen need not show a likelihood of success on appeal, *United states v. Garcia*, 340 F.3d 1013, 1020 n. 5 (9th Cir. 2003); but only that the appeal presents an issue that could be decided either way. *United States v. Steinhorn*, 927 F.2d 195, 196 (4th Cir. 1991). It is noteworthy that from the “Chicago 7” case originating in 1968, to the cases arising from the 2016 presidential inauguration in Washington D.C., to the prosecution of RAM defendants in the Central District of California in 2019, it is difficult to identify a defendant who was convicted under 18 U.S.C. § 2101, or whose conviction under that statute was affirmed on appellate review.¹ Last month a district court in the Central District of California considered the identical constitutional issue that Gillen intends to raise on appeal and concluded, on June 3, 2019, that 18 U.S.C. § 2101 is facially unconstitutional. The California district court in these cases accordingly issued an Order

¹ Albeit only a few of these case dispositions were the result of challenges to the constitutionality of the statute.

dismissing the indictments against the several defendants prosecuted thereunder. (*United States v. Rundo*, Case No. 2:18-cr-00759 (C.D.Cal., June 3, 2019.) That decision is now under appellate review and clearly constitutes a substantial question of law.

Respectfully submitted,

By: S/ David A. Eustis

Of Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system that will send notification of such filing to all counsel of record.

S/ David A. Eustis

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